

mediators - finding our center and sustaining our energy

Finding Our Center
and
Sustaining Our Energy

Keynote Address

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My objectives:

1. Acknowledge fatigue of spirit
2. Identify some of its sources
3. Suggest some ways to reduce it – and thus to re-charge our spiritual batteries
4. Along the way, suggest some ways to encourage the participants in our mediations to move more into the spirit that we want the mediation process to reflect.

Some Thoughts About Spiritual Fatigue

First, some important **disclaimers**:

1. This is a subject in which **many of you are likely to be way ahead of me**,

both in diagnosis and treatment –

so there is a substantial risk that my comments will be superficial and will cover no new ground.

2. Moreover, this is a **subject to which other people** have

devoted substantial work and

for which others have **developed a wide range of responsive proposals** or techniques.

For example, Len Riskin's widely recognized work on mindfulness meditation.

3. As you might expect from a judge,

my discussion of this problem will be heavily rationalistic.

It will **not** be informed by insights from other disciplines or cultures.

I will discuss only a limited number of the pieces of the fatigue puzzle – and

the suggestions I will be offering will be in the nature of **“cognitive rearrangements”** –

without any claim to therapeutic subtlety.

4. **One additional caveat:** my thoughts about these matters are informed by a specific perspective and set of experiences.

I work for a public institution [the United States District Court for the Northern District of California]
and

all the mediations on which my views are based are sponsored by that public institution.

Moreover, the mediations from which I generalize all occur in the context of litigation filed in federal court – so, significantly, the mediations that inform my views do NOT include disputes arising in family law or in probate matters.

Many commentators would suggested that there are much larger roles to be played in mediations in family law and in probate matters by emotion, by relationship preservation and repair, and by underlying interests that may not be rooted in or even connected to legal claims, defenses, or positions than in mediations in the kind of general civil litigation most commonly encountered in federal courts.

Given the fact that the mediations about which I write are sponsored by a federal court, the values that **must** dominate my approach to the issues we will be discussing today are rooted in notions about

the role of courts in our society and about

the primacy in our judicial system of integrity of process.

Most of **you** work most of the time in a different setting:

you work in the private sector and you work for private clients.

It is not appropriate for me to assume that

the same values operate

with the same force

in these two different environments.

I do not know how transportable my ideas are into your private sector work.

I know what is most important in my sector.

And I think I know what “works” best in my sector –

but if I am wrong about what “works” best in my sector, I don’t care –

because what is most important in working for the court is process, not result.

In contrast, I cannot purport to know what is most important in your private sector work;

Not knowing what is most important in any given private sector mediation, I obviously cannot know what “works” best in that setting.

But I have a strong suspicion

(supported by hope but no empirical study)

(1) that there is **not** as much difference as we might at first assume between

what “works” in mediations in the public sector and

what “works” in mediations in the private sector –

and

(2) that **“integrity of process”** often is as important

to “success” in private sector mediations

as it is in mediations sponsored by the courts.

The theory that supports this hope runs as follows:

As a general proposition, the more confidence the parties have in the integrity of the process, the more confidence they are likely to feel

that the process has produced an **analysis** that is as **reliable** as possible, and that

the process has **identified** accurately **what terms** of settlement **might be accessible** –

and confidence about these matters might be the single most significant contributor to achieving settlement.

OUR SPIRITUAL FATIGUE

Our spiritual (or psychic) fatigue no doubt has **many sources** – and

a goodly number of these probably lie far *beyond my ability to identify*.

But I choose to **proceed from two working hypotheses**:

(1) That some of the fatigue we experience is unnecessary (avoidable or reducible); and

(2) That one way to reduce it is

to identify its sources, and

then devise strategies that are tailored to reduce the potency of the specific source in question.

Two sets of assumptions underlie and inform much of my thinking in these arenas:

1. I believe that

(1) by being transparent about ourselves and the processes we host,
_____ and

(2) by inviting the parties and lawyers to participate in making process decisions:

→ we communicate respect for the parties, that

→ respect is one of the most liberating and energizing forces in human interaction, and that

→ demonstrating respect in this way encourages parties to embrace the spirit of mediation.

2. There is **one variety of transparency** that may be under-utilized but that I believe can have especially positive effects:

the shorthand title I use for this variety of transparency is

“name it and explain it.”

- (a) Here is what I mean by **“name it and explain it”**:

When you are worried or concerned about something before or during a mediation that could compromise the potential of the process,

(1) articulate directly to the parties what that concern is –
“name it” –

(2) then explain how that behavior or attitude or circumstance could impair the parties’ ability to maximize what the mediation could do for them.

- (b) The “name it and explain it” process can

(1) help the parties become more self aware, and

(2) help them understand better the effect on the process that a position or approach is having, and

(3) pull the parties into the process of finding ways to overcome a problem –

converting them from source of problem to source of solution – and, in the process,

energizing their participation in the mediation.

I will give examples of this approach in a few minutes.

SOME SOURCES OF SPIRITUAL FATIGUE AND SOME THOUGHTS ABOUT HOW TO REDUCE THEIR SWAY

1. Ironically, one source of our fatigue may be our fear of admitting it.

For some of us, it is difficult to admit that we are tired of trying to do good.

As mediators, we see ourselves as forces for creating, for constructing, for connecting, for equipping others to move on.

Being a “force” for good is central to our sense of professional self. And we threaten that sense of self if we admit that we are running low on “force” – or that we are less interested in being a “force” than we think our job description requires.

It takes energy, however, to suppress or deny something that is real – and spiritual fatigue, at least for some of us, is real.

As an aside, we might ask ourselves whether the notion of mediator as “force” is consistent with core mediation theory?

In any event, we might **begin the process of renewing our spiritual energy** by

acknowledging the reality of spiritual fatigue and

accepting it as natural by-product of our work.

In fact, we could view spiritual fatigue as evidence of our conscientiousness, of how much of ourselves we put into our work as mediators.

But sustained spiritual fatigue, even if acknowledged, obviously is not healthy – for us and for the mediations we host.

→ It can make us bad at our jobs –

reducing our patience, and

thickening our skin to the point of

impairing our ability to listen to and to connect with the other people in our mediations, and

→ In the end, it could drive us away from this kind of work.

So merely acknowledging our fatigue is not a sufficient response to the problem.

We need to look for more sources and more solutions.

2. A **second source** of our fatigue may be **repetition of process** –

which can cause a form of boredom,

i.e., an absence of the stimulation we felt when the process was newer,

the stimulation of discovery and learning, and the stimulation provided by the challenge of trying to master a new set of skills.

My process has taken on a pretty predictable pattern – so **the process itself**, at least as I view it before a settlement conference begins,

can feel stale and uninspiring.

How might we attack this source of fatigue?

A. We might **change the pattern or process** we use in our mediations – as doing something new requires more attention and engagement, more thought about what we are doing and why.

But if we change the process that we have found most productive, **we risk delivering poorer service** to the parties – missing opportunities, stumbling into conduct that reduces rather than enhances the parties' chances for success.

B. A less risky and perhaps more effective response to this source of fatigue might be to **shift the center of our attention from process to people**.

Even if the process tends to repeat itself, the people, as individual human beings, do not.

I find that when I shift my focus from process to persons, i.e.,
when I focus on the individual human beings with whom I am
meeting,
and when I try to “enter” their situations,
their stresses and dilemmas,
my energy returns.

This return of energy may be in part a by-product of shifting my emotional attention away from myself and my circumstances (e.g., boredom) and toward other people and their circumstances and needs.

So one way to “unlock” our energy is to “lock in” in on others.

But is it risky to shift our attention away from process and toward persons?

Isn't 'process' the center of mediation?

Or are we learning that the **center** of mediation is authenticity –
and that focusing on persons,
instead of being pre-occupied with process,
may be critical to authenticity?

3. **Another source** of fatigue might be the relentlessness and the intensity of
the psychic demands
that being at the center of the process can impose on us.

Solution: *remove ourselves from the center* —

intellectually (analytically), emotionally, and physically (time talking, physical position, etc.)

This, of course, is much more easily said than done.

But we might take a significant step in this direction if we could teach ourselves to stop feeling that we are at the center, or (stated differently) to stop seeing ourselves (in our internalized 'model' of mediation) as at the center.

In theory, it is the parties who are supposed to be at the center;

so we could both conform our practice to our theory and

reduce one source of stress

if we could return to the parties the primary roles in the process, especially in the latter stages of the process, where we seem to be most tempted to take over.

4. Our fatigue also might be a product of infection by their fatigue?

When mediation was a new experience, at least some lawyers and clients brought a special kind of energy to it – inspired in part by fear of the unknown and by a sense of process adventure and anticipation of learning.

But just as real familiarity can breed contempt, *assumed familiarity can breed complacency.*

Thus, some experienced mediators complain that lawyers and their clients seem to **take mediations less seriously** than they did when the ‘movement’ was fresher – and that lawyers and clients **prepare less well for and expect** to accomplish **less** in the process.

In a variation on this theme, some neutrals complain that lawyers and parties increasingly seem to **assume that one mediation session will not be sufficient** to determine whether a settlement can be reached – so the first mediation session creates less of a crucible effect and more than occasionally takes on the spirit of foreplay. Increasingly, counsel seem to assume that the first mediation will not identify the full range or extent of accessible options/terms of settlement – and that the best possible terms will be ferreted out only through substantial follow-up efforts by the neutral or a second or third mediation session.

I also have heard some experienced mediators complain that there has been an increase in the “gaming” of mediation –

that mediation too often is just another arena for manipulative, postured, or other disingenuous behaviors, and

that too often lawyers and parties use mediation for ulterior purposes (easy discovery, delay, harassment, to impose expense burdens, etc.).

What antibodies might we muster to combat this kind of infection?

Name it and explain it: in the pre-session phone conference, describe your concerns about apparent trends by some parties and/or lawyers to prepare less for and to “game” more in mediations (especially court sponsored mediations).

Tell the parties that:

→ Lack of preparation compromises their ability to use the mediation to its full advantage.

→ There is no reason that two or more sessions should be necessary – and that by assuming the mediation process will take two sessions the participants may well needlessly increase time to disposition and clients’ costs.

→ Gaming is obvious – and, in our experience, often backfires – causing resentment and increasing distrust – which drive up transaction costs and make it more difficult and expensive to get a settlement.

If you, as mediator, are concerned that the lawyers who participate in your pre-session phone conference might not take your admonitions to heart, consider:

(1) Holding a second pre-session phone conference in which the clients are required to be present (so the clients can hear your concerns directly); or

(2) Deciding in advance, with the explicit concurrence of the lawyers who participate in the phone conference, that the first mediation session will be a compact event for exploratory purposes only (e.g., to identify the principal barriers to getting a deal or the tasks that need to be undertaken to position the parties for really fruitful negotiations).

So the parties will anticipate that the first session will be shorter and less expensive – and that it will be followed by a longer session during which there would be serious negotiations.

5. Among sources of unnecessary spiritual fatigue, **misplaced or exaggerated expectations** might be most significant.

We may be sapping our own spirit by

expecting too much of the parties and lawyers,

expecting too much of the mediation process, and, most dangerously,

expecting too much of ourselves.

A. Do we sometimes expect too much of the parties and lawyers?

We invite disappointment if we expect all the participants in our mediations to shed all their adversarial instincts and behaviors when they begin a mediation.

While the “adversary system” might intensify self-protective or gaming instincts, or help lawyers and clients rationalize other forms of self-serving conduct, the roots of these kinds of behaviors likely are very deep in the human animal. Competition appears to be a fundamental fact of our existence – a product of a survival instinct that may be as ineradicable as breathing. In other words, it is likely that the adversary system is a reflection, rather than the ultimate source, of drives that are in some sense intrinsic to the human condition.

B. Do we sometimes expect too much of the process itself

We also invite disappointment if we exaggerate the transformative power of mediation as a process.

When the mediation movement was young, ambitious promises were made about its potential to transform not only the process of disputing, but also the relationships between the disputants and the disputants themselves.

While these promises may be kept more frequently in family law and probate matters, they often elude us in other kinds of cases.

As I am sure all of you have learned, the less than laudatory aspects of human nature are distressingly resilient; they demonstrate a remarkable ability to resist even the most alluring invitations to positive change.

Quixotic assaults on these realities are bound to leave us feeling depleted.

We also are likely to experience strain and frustration if we sense that lawyers and/or litigants are not permitting themselves even to be open to the constructive powers that we believe are latent in the mediation process.

We are likely to **resent people who won't give the process a chance** to do its good. And **resentment is a form of anger that consumes energy.**

[As an aside, it also might be useful for us to ask ourselves whether our considerable **expectations of the process are rooted in some form of vanity??**

When we tell ourselves about how much power to do good the **process** has,

are we really telling ourselves how much power to do good **we** have?]

At a minimum, we need to accept the fact that the process itself is not an independent source of information or evidence.

If a party really needs information from a source that is not available during the mediation in order to make a wise decision about what is in its best interest to do, the mediation process itself cannot fill that void.

In sum,
we might reduce one source of strain and fatigue

if we could make ourselves comfortable with more realistic expectations of the people and the process – or,

to frame the matter more positively,

if we could be more forgiving of others

by being more understanding about

the circumstances in which they find themselves and

the social and psychological forces to which all of us are vulnerable.

C. I worry that an even more potent source of spiritual fatigue is expecting too much of ourselves.

I don't mean that we host too many mediations.

Instead, I mean that in the mediations that we host, we tend to burden ourselves by

exaggerating

our ability,

our contribution, and

our responsibility.

(1) Exaggerating our **contribution**:

When I spoke here six years ago, I told you about the differences in perception between mediators, on the one hand, and litigants and lawyers, on the other, about what occurred and what was accomplished during our mediations.

In a pattern that is stark and unsettling, our mediators have tended to report positive accomplishments in appreciably higher percentages of our mediations than either the lawyers or their clients report.

In each of the following areas, our mediators report accomplishment appreciably more often than the other participants:

- a. bridged a communication gap,
- b. discussed the relative strengths of the parties' positions,
- c. clarified or narrowed issues,
- d. identified underlying interests (beyond legal positions),
- e. explored solution options that could not be secured through a judgment after trial.

By exaggerating how much we have contributed in the past, we put pressure on ourselves to contribute as much in the future.

We risk adopting misleading and demoralizing standards for assessing “our” “**performance**” in this role.

And we **slip into thinking that what we are doing is “performing.”**

(2) **Exaggerating our responsibility might be an even bigger source of fatigue.**

I assume that most of us have had some version of the following kinds of thoughts:

“I’ve got to get this case settled.

That’s what they hired me for – or

that’s what the court expects from me.

So, to earn my money, or

to prove (again) that I am good at this job,

that I am not a fake who has no business being in
this business, and

that I deserve to exist,

I’ve got to get this case settled.”

When we assume too much responsibility for the outcome or productivity of our mediations,

we put role-distorting pressure on ourselves

(tempted to push, to manipulate, to cut process corners) –

and,

ironically, we violate the spirit of mediation,

whose **purposes** include

(1) freeing parties from disabling dependencies and

(2) encouraging parties to assume direct responsibility
for

➤ understanding their situation

(in the litigation and outside it),

➤ generating or identifying the full range of possible solution options, and

➤ deciding which course to follow.

What steps might we take to reduce fatigue

that is rooted in exaggerating our responsibility to get a deal?

1. Name it and explain it – perhaps during the pre-session phone conference, or at the beginning of the mediation session.

Tell the participants that you have been feeling some spiritual fatigue

and tell them why –

tell them that you have caught yourself exaggerating your personal responsibility to make the mediations you host “successful” – and that you have slipped into the mistake of equating success with settlement.

Explain that a mediator who proceeds on the theory that it is her responsibility to get the case settled has **turned mediation upside down** and

can end up gutting the process’s potential

by reducing the room for participation by others –

which, in turn, can

cut off access to useful information,

reduce the likelihood of identifying the full range of solution options, and

reduce the parties’ feeling that they “own” the selected solution and are duty-bound to honor it.

2. Occasionally, in appropriate circumstances, we also might consider talking to the parties about **WHY** some litigants and some lawyers **want the mediator to assume responsibility** for analyzing the case, predicting its outcome, and/or identifying wise terms of settlement.

→ We could acknowledge that because litigation is riddled with informational and predictive **uncertainty**, it is quite **rational** for parties to look for sources of certainty, or at least for ways to reduce their feeling of uncertainty [the reality will remain].

Understandably, some parties look to the **mediator** to serve as a **source of greater certainty** by offering guidance or reassurance.

→ We also might acknowledge that sometimes parties seem to fear that they will **feel diminished** by a settlement –

to fear that a compromise would feel like

a failure (to attain or preserve everything), or

an abandonment of “principles,” or

a partial or oblique admission of fault.

We could point out that it is understandable that parties who fear such feelings might want to **place the responsibility or blame for agreeing to a proposed settlement on someone else;**

in other words, to reduce the risk of loss of self-regard,

they want to turn over to the mediator the responsibility for deciding whether the proposed terms should be accepted.

At least in some circumstances, discussing these kinds of concerns openly with the parties might encourage them to play the central roles in the process that we want them to play.

II. HOW ELSE CAN WE RE-CHARGE OUR MEDIATOR BATTERIES?

By being transparent about our selves and our process

By including the participants in making process decisions and

in determining how to respond to or move forward from mistakes (by us or by others), problems, ‘impasses,’ limitations, etc.

E.g., by asking the parties to try to identify the sources of impasse and to try to identify ways to move forward.

→ By elevating honesty above ‘outcome.’

→ By being genuine and natural in our roles.

Not trying to be someone we are not – by NOT trying to “play some role” or engage in some “performance.”

→ By **knowing ourselves**.

E.g., understanding the kinds of situations or behaviors that cause us stress or anger – and using that understanding to reduce the power over us that these situations or behaviors otherwise would have.

E.g., I feel acute anxiety when I am aware that I don't understand something, or when I don't know something that I think I should [a form of loss of control?].

I react in anger to arrogance [roots in an upbringing in quite modest circumstances but in which considerable attention was given to status?].

→ By **accepting the self that we come to know**
(with its fallibilities and limitations), **AND**

→ **By renouncing the pursuit of perfection.**

The *pursuit of perfection* is a form of vanity and self-focus

that can make us inflexible and that

acts as a barrier between us and others.

In sharp contrast, **imperfection** that is **acknowledged and accepted**,

helps us and the parties **relax**.

Our imperfection:

→ helps others connect with us in our humanity, and

→ encourages others to be more forgiving of themselves and others.

I waste a lot of energy flagellating myself for mistakes I make hosting settlement conferences.

And this form of **self-focus** can operate as a serious **distraction** when I indulge in it during a settlement conference.

We might be healthier and have more energy if we could persuade ourselves to view our mistakes as **opportunities** –

To view our mistakes as **liberations of and invitations to** the parties:

(a) liberating them from the imprisonment that can be imposed by excessive fear of error and

(b) inviting them to play the central roles in the process that our theory contemplates.

→ Finally, we may have much **better access to the energy that is within us**

if we can keep the following three animating truths

in the front of our minds:

1. That

(a) the processes we are trying to use and

(b) the spirit we are trying to encourage

are beautiful and important.

2. That the vast majority of the time

the vast majority of the people we serve

(a) respect and are grateful for what we do, and

(b) believe that they have benefitted from the process we hosted.

Evidence of these facts:

even in our court ADR programs,

where participation is presumptively mandatory:

➤ **90%** believe that the **process was fair**, and

➤ **80%** believe that the **benefits** they received from participation **outweighed the burdens** and costs that the process entailed.

3. That we do teach, sometimes only a little and sometimes only obliquely, but we do teach.

→ We teach listening, acknowledging, and engaging.

And listening, acknowledging, and engaging are, most elementally, demonstrations of respect.

→ So what we teach

is that *it is*

'how we treat one another' that

(a) defines most critically what we are as human beings and that

(b) holds the greatest power for good.

These are the things that are at the center of our work –

and it is by staying centered in them

that we can best sustain the energy

to do our work well.